U.S. House of Representatives

Committee on the Judiciary, Subcommittee on the Constitution

Hearing on H. Res. 568 and the

Appropriate Role of Foreign Judgments in the Interpretation of American Law

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Thank you for the opportunity to provide a statement on proposed House Resolution 568. I want to make three points. First, the "law of nations" and the practices of other constitutional systems have been used since the Founding period to assist the Court in reaching appropriate interpretations of American law. Second, the Court's use of foreign law in Lawrence v. Texas, 123 S. Ct. 2472 (2003), was not to bind or control its judgments of constitutional questions under U.S. law but to assist the Court in making the best interpretations of our own law. Third, legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions and might be perceived to threaten judicial independence in ways inconsistent with important traditions of American constitutionalism. For these reasons I would urge the House not to adopt the proposed resolution.

Far from being hostile to considering foreign countries' views or laws, the Founding generation of our Nation had what the signers of the Declaration of Independence described as a "decent Respect

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[1]Affiliation given for identification purposes only. I speak only for myself and not for my university.

to the Opinions of Mankind." Congress was empowered in our Constitution to regulate foreign commerce and to prescribe "Offenses against the Law of Nations," the President authorized to receive ambassadors, and the federal courts given jurisdiction over cases arising under treaties as well as under the Constitution and laws of the United States, and over suits affecting ambassadors, or involving aliens or foreign countries as parties in some cases. The Federalist Papers explained that

> An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable ... that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.

The Federalist No. 63 (Hamilton or Madison). Although Federalist No. 63 was not directed to the courts, Federalist No. 80 (Hamilton) explained the need for a judicial power broad enough to resolve disputes in which foreign nations had an interest in order to avoid causes for war.

U.S. Supreme Court Justices from the founding period recognized the relevance of the "law of nations" in interpreting U.S. law and resolving disputes before the federal courts. As Justice Story said, in writing the foundational Supreme Court decision in Martin v. Hunter's Lessee, the judicial power of the United States included categories of jurisdiction, such as admiralty, "in the correct adjudication of which foreign nations are deeply interested ....[and in] which the principles of the law and comity of nations often form an essential inquiry." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 335 (1816). The Justices have used understandings of the law and practice of other nations on a

number of occasions to assist in reaching correct interpretations of the U.S. Constitution. Thus, for example, in Worcestor v. Georgia, 31 U.S. 515, 560-61 (1832), the Court, in an opinion by Chief Justice John Marshall, considered the law of nations as helpful in defining the status of Indian tribes under the U.S. Constitution, concluding that they retained rights of self-government with which the states could not interfere. In Holmes v. Jennison, 39 U.S. 540, 569-73 (1840), Chief Justice Taney's opinion relied on the practices of other nations to help interpret the Constitution as precluding a state governor from extraditing a fugitive to Canada.[2]

In other cases, as well, the early Court took cognizance of the "law of nations"or other countries' practices in resolving particular controversies: In The Schooner Exchange v. McFaddon, 11 U.S. 116, 137-46 (1812), the Court relied on "the usages and received obligations of the civilized world" to hold a foreign sovereign's vessel in a U.S. port to be immune from judicial jurisdiction. In Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction" exists. And in determining what the law of nations was, in 1815 the Court commented that "[t]he decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect." Thirty Hogsheads of Sugar v. Boyle, 13 U.S. 191, 198 (1815).

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[2]Although there was no opinion of the divided Court and the writ of error was dismissed for want of jurisdiction, Justices Story, McLean and Wayne concurred "entirely" with the Chief Justice's opinion. 39 U.S. at 561. The Reporter's Note at the end of the case indicates that after the case was disposed of in the Supreme Court, the Vermont state court concluded that, "by a majority of the Court it was held that the power claimed to deliver up George Holmes did not exist" and discharged him. 39 U.S. at 598.

This brings me to my second point. The Court's recent references to foreign law and legal practice seems to me entirely consistent with the founding generation's respectful interest in other countries' opinions and legal rules. *Lawrence* did not treat foreign court decisions as binding authority, which is an important distinction. Rather, the foreign decisions were cited in *Lawrence* for two purposes: The first was to correct or clarify the historical record referred to in Chief Justice Burger's opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), a decision reversed by *Lawrence*. As the *Lawrence* Court wrote, "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction," including the *Dudgeon* case decided by the European Court of Human Rights in 1981. Second, the *Lawrence* opinion suggested, the European decisions invalidating laws prohibiting adult, consensual homosexual conduct raised the question whether there were different governmental interests in the United States that would support such a prohibition on human freedom, and concluded there were not. See 123 S. Ct. at 2483. This use of foreign law to interrogate and question our own understandings is something that will help improve the process of judicial reasoning, but certainly does not necessarily lead to the conclusion that our law should follow that foreign law.

Indeed, on a number of occasions our Court has referred to foreign practice to *distinguish* our own Constitution from that of other nations. In the great Youngstown Steel Case, the Court held that President Truman lacked constitutional power to order seizure of the steel companies. Justices Frankfurter and Jackson alluded to the dangers of dictatorship that other countries had recently experienced, Justice Jackson explaining in some detail features of the Weimar Constitution in Germany

that allowed Hitler to assume dictatorial powers. See Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J.) ("absurd to see a dictator" in President Truman but "accretion of dangerous power does not come in a day"); *id.* at 651-52 (Jackson, J.) (discussing German, French and British approaches to emergency powers). And in Miranda v. Arizona, 384 U.S. 436, 489-90 (1966) the Court suggested that our Fifth Amendment should be interpreted to provide at least as much protection to rights against improper custodial interrogations as did certain other countries.[3]

Considering other courts' decisions on shared concepts – of liberty, equality, freedom of expression, cruel and unusual punishment – can help clarify what the U.S. Constitution stands for – to what extent its precepts are shared, and to what extent they are distinctive. The U.S. constitution has, directly or indirectly, inspired many other nations to include commitments to liberty, freedom and equality in their own constitutions. It is thus understandable that such nations may look to our courts' decisions and over time expect our courts to be aware of their courts' interpretations of legal concepts having a common source of inspiration. For the many nations around the world whose own constitutions have been inspired in part by that of the United States, and whose judges believe that we share commitments to ideas of liberty, freedom and equality, the U.S. Court's occasional consideration of foreign court decisions is, in a sense, a recognition of common judicial commitments –often inspired

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[3] After describing the protections of, inter alia, England, Scotland and India, against improper custodial confessions, 384 U.S. at 486-89, the Court indicated that our own situation was similar enough that their positive experience gave " assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them." *Id.* at 489. It went on to say: "It is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined." *Id.* at 489-90.

by the example of the United States – to the protection of individual rights. And on the current Court, Chief Justice Rehnquist,[4] as well as Justices Breyer,[5] Ginsburg,[6] Kennedy,[7] Scalia[8] and Stevens,[9] have referred to or noted foreign or international legal sources in their opinions in U.S. constitutional cases. It is thus not only a traditional legal practice but one that has been used by justices who otherwise have very different views.

Finally, the questions of what sources are to be considered in giving meaning to the Constitution in adjudication is one that is, in my view, committed by the Constitution to the judicial department. Marbury v. Madison famously explained: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). A core aspect of determining what the law of the Constitution is requires consultation of relevant and illuminating materials – from the

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[4]See Planned Parenthood v. Casey, 505 US 833, 945 n. 1 (1992) (Rehnquist, C.J. dissenting) (describing German and Canadian constitutional cases on abortion). But cf. Atkins v. Virginia, 536 U.S. 304, 324-35 (2002) (Rehnquist, C.J., dissenting).

[5]See, e.g., Foster v. Florida, 537 U.S. 990, 991-93 (2002) (Breyer, J., dissenting from denial of certiorari).

[6]See Grutter v. Bollinger, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) (referring to international covenants that provide for temporary measures of affirmative action).

[7]See Lawrence, 123 S. Ct. at 2481, 2483 (discussing European Court of Human Rights cases invalidating laws prohibiting adult homosexual conduct).

[8]See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting) (referring to Australia, Britain and Canadian prohibitions on anonymous campaigning as bearing on whether such a prohibition protects or enhances democratic elections). But cf. Printz v. United States, 521 U.S. 898, 921 n. 11 (1997) (Scalia, J.)

[9]See Atkins v. Virginia, 536 U.S. 304, 316 n. 21 (2002) (referring to views of the "world community" on imposition of the death penalty on the mentally retarded as reflected in an amicus brief of the European Union).

enactment and ratification history, from interpretations by state and federal courts of the provision or of analogous state constitutional provisions, from the course of decisions by legislatures and executive officials about what action is required or permitted, and from the considered judgments of other courts and commentators on the same or analogous questions. All of these kinds of sources have been and may be considered when the justices conclude that they shed legal light on the problem before them.

Efforts by the political branches to prescribe what precedents and authorities can and cannot be considered by the Court in interpreting the Constitution in cases properly before it would be inconsistent with our separation of powers system. It could be seen both here and elsewhere as an attack on the independence of the courts in performing their core adjudicatory activities. Around the world, the most widely emulated institution established by the U.S. Constitution has been the provision for independent courts to engage in judicial review of the constitutionality of the acts of other branches and levels of government. Congress should be loath even to attempt to intrude on this judicial function, with respect to a practice that dates back to the founding, and at a time when the United States is deeply engaged in promoting democratic constitutionalism in countries around the world, including provision for independent courts to provide enforcement of constitutional guarantees.